Human Rights of the Unborn

FÉLIX RUIZ ALONSO

The right to life of the unborn child, from the moment of conception, is a fundamental human right.

This right requires special protection.

Justinian states: *infans conceptus pro iam nato habetur*—a child, once conceived, is considered already born.

Based on this statement—which equated the newly conceived with the born—in ancient Rome, the parent could make a will in favor of the unborn; the unborn child would be free or enslaved according to the status of the mother at the time of conception; etc. Rights to the fetus were recognized.

This legal sensibility—albeit primitive—of Roman Law contrasts with the current draft Constitution*, which lacks any reference to the rights of the unborn, of human beings barely conceived.

In Title V of the draft new Brazilian Constitution, which deals with the Social Order, there is a chapter dedicated to Special Guardianships. It addresses childhood, adolescence, the disabled, the elderly, etc.

There is, however, no reference to the unborn (embryo, fetus).

This absence is striking for two main reasons: first, because today not only abortion is rampant, but also the manipulation of human embryos (*in vitro* fertilization, embryo storage, surrogate mothers, etc.) and, second, because the issue has a profound legal-moral dimension, with undeniable repercussions at the human and national levels.

This is, therefore, not a constitutional gap — but a gross omission. In practice, absence means leaving room for all kinds of experimentation and arbitrariness in the treatment of human embryos.

The Constitution must be clearly and irrefutably defined in favor of life.

Failing to protect human embryos, respecting their natural "habitat" in the mother's womb, and allowing their development to follow its own pace means—let's be blunt—opting for death.

At the Third World Congress of Embryology and In vitro Fertilization, held in Helsinki in 1984, the data presented on the matter were as follows: of 7,733 eggs fertilized in vitro (that is, in test tubes, outside the woman's body) and then implanted in women's uteruses, only 590 were born. The number of embryos lost was 7,143. This means that, without taking into account what happened to conceive the 7,733 embryos, the death rate was 92.67%.

The law traditionally recognizes the rights of unborn children, in the expectation of being born alive.

In this sense, the Civil Code states that: "*The civil personality of man begins at birth; but the law protects, from conception, the rights of the unborn child*" (art. 4).

The Civil Code's view is truly suggestive, because if only the person—that is, the one born alive—is subject to rights, why does the law protect the rights of the unborn child, which is not was born, and it is not even known whether it will be born alive?

The unborn child, even though in the positive legal context not considered a person, is a subject of rights.

Strictly speaking, human personality is not merely a positive legal creation, but rather a natural legal reality (Limongi França, Rubens "Manual de Direito Civil", Vol. I, 3rd ed., São Paulo 1975, p. 406).

In the wake of that provision of the Civil Code, case law recognizes the rights of those who will be born alive, from the moment of their conception.

Thus, decisions with the following or similar content are common: "*Support is due to the daughter, referred to as an unborn child at the time of filing a (support) action, pursuant to Article 4 of the Civil Code and subsequently registered by the father himself*." (RT 560/220).

Today, however, the questions that arise are no longer the traditional ones. It is not about: investigating paternity, hereditary issues, pensions, or compensation, dating back to the conception of stillborns.

Today, the issue in focus is the right to life of unborn children.

This is something much deeper and more fundamental. Obviously, it makes no sense for the law to protect the rights of the unborn, in the expectation of life, if they do not have the right to life. Precisely because they have the right to life, the law has protected the rights of the unborn since ancient times.

Without the right to life, no other right can subsist.

The new problem surrounding this fundamental issue, such as human life, demands that the right to life of unborn children be addressed by the Constituent Assembly.

In our day and age, the reference to Civil Law, nor the classification of abortion as a crime in criminal law, nor even the magisterial treatment that jurisprudence gives to the unborn child, are not enough to safeguard their right to life.

Express mention of the right to life of the unborn child, among the special rights to be protected by the Constitution, is indispensable.

In this regard, it is worth remembering what the "Declaration of the Rights of the Child" says about this:

"*The child (...) shall have the right to grow and be raised in health; to this end, both the child and the mother shall be provided with special care and protection, including adequate pre- and post-natal care*" (Principle V of the Declaration approved at the UN in 1959, signed by Brazil).

Thus two aspects of this child's right stand out: prenatal care — that is, care owed to unborn children, to those conceived — and its purpose. In other words: if the fetus is not cared for, it is useless to talk about the right to grow and be raised healthily, since the unprotected fetus may die before birth through any maneuver or attack, due to its defenselessness.

Indeed, all human rights lose all meaning if the initial protection of the human being is lacking, from conception.

What is the point of declaring that *"every individual has the right to life, liberty, and the security of his person*" (Article 3 of the Universal Declaration of Human Rights) if he can be exterminated before birth?

Or what is the point of proclaiming that: "*The Constitution guarantees to Brazilians and foreigners residing in the country the inviolability of the rights pertaining to life, liberty, and security*" (Article 153 of the Brazilian Constitution) if human embryos can be attacked with impunity?

Law — in our day — can no longer passively wait for a fetus to be born alive before declaring it a person. It is urgent to trace the beginning of personhood, as a subject at least of the right to life, back to the moment of fertilization.

This, in fact, had already been foreseen, in some way, by Clóvis Beviláqua, in his draft Civil Code, in which personhood began at conception under the condition of being born alive.

Thus, even if there is no innovation regarding the legal definition of the natural person, it is essential to recognize the right to life of the human embryo: it is necessary to delve deeper into the rights of the unborn.

The issue certainly involves difficult anthropological questions — what is human? when does it begin? — but among other things, it is certain that each and every human person does not experience a break in continuity from the embryonic stage until death.

The person is the same. It merely passes through successive phases—embryo, fetus, childhood, pre-puberty, puberty, maturity, old age. New knowledge in biology has now definitively given us the understanding of individual identity, which remains the same throughout life: from conception to death.

It is worth reproducing the words that Professor Lejeune, a world authority on genetic biology, addressed to the special committee of the US Congress on April 23, 1981:

"*Life may have a very long history, but each individual has a well-determined beginning: the moment of conception." When germ cells (egg and sperm) fuse, "all the genetic information necessary and sufficient to express all the individual's innate qualities is already available (...). All the data necessary for the issuance of their identity document is already available (...).*

Accepting that after fertilization a new human being began to exist today is not a matter of taste or opinion (...), it is not a metaphysical hypothesis, but experimental evidence."

These lines should serve to alert constituents to this issue—the right to life of the unborn—which is not only fundamental, but transcendental.

To remain silent about it is not to resolve it —on the contrary: it would be tantamount to a thanatological pact.

The author holds a PhD in Law from the University of São Paulo.

(*This article was written in 1987 with the constituent deputies who wrote the 1988 Brazilian Constitution in mind. Unfortunately, the author was not heard and the Constitution does not specifically protect the unborn.)